

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL REVISION APPLICATION NO.168 OF 1995**

Santu G. Nyaharkar	...Applicant
VS.	
State of Maharashtra	...Respondent

Mr.B.G.Tangsali for the Applicant
Mr.A.S.Gadkari,A.P.P. for State

**CORAM: A.S.OKA, J.
DATE : AUGUST 17,2005**

ORAL JUDGMENT:

1. On 25th July 2005 submissions were heard and the Revision Application was adjourned for dictation of the Judgment.

2. The challenge in this Revision Application is to the conviction and sentence of the Applicant for an offence punishable under Section 408 of I.P.C. The learned Chief Judicial Magistrate, Nashik convicted the Applicant and he was sentenced to suffer S.I. for one year and to pay fine of Rs.500/-. In an Appeal preferred by the Applicant the Judgment and the Order passed by the learned Magistrate has been confirmed.

3. The Applicant was employed as an Auditor in the Department of Cooperation of the State Government from the year 1968. The Applicant was working as a Secretary of the Waki Khurd & Budruk Vividh Karyakari Seva Society during the period from 1st July 1976 to 30th June 1977. The case of the prosecution

is that during the said period the Applicant used to maintain the books of accounts, the receipts, vouchers and other documents of the society. As the Applicant was an Auditor, he was authorised to audit accounts of the said society. The allegation of the prosecution is that though the Applicant received a sum of Rs.230/- from one Barku Laxman Arote on behalf of the society, credit entry of the said amount has not been made. Further allegation against the Applicant is that he has shown debit entry in the sum of Rs.1692/- on two occasions though there were two receipts only for Rs.3217/-. There is a similar allegation made against the Applicant as regards double entries on the debit side in the sum of Rs.2088/- and Rs.2570/-. It is alleged that the Applicant had recovered a sum of Rs.130/- from one member of the society and the said amount is not entered in the cash book. It is also alleged that though the deposit in the name of the Applicant is only of Rs.200/-, he has withdrawn Rs.500/- on account of the said deposit. The total amount allegedly mis-appropriated by the Applicant is Rs.7167/-.

4. An offence was registered on the basis of the report of the District Auditor of the Cooperative Societies. The defence of the Applicant seems to be initially of a complete denial. It appears that it is virtually an admitted position that the Applicant accepted his liability to pay the alleged misappropriated amount. Relying upon the audit report,

evidence of the prosecution and other material on record the learned trial Judge held that misappropriation of sum of Rs.7167/- was made by the Applicant in between the period from 1st July 1976 to 30th June 1977. The learned Sessions Judge has confirmed the conviction and sentence.

5. The learned Advocate for the Applicant submitted that no ingredient of offence under Section 408 of the said Code were established by the prosecution. He submitted that there is no evidence adduced by the prosecution to prove defalcation on the part of the Applicant. He submitted that there is no evidence regarding dishonest intention on the part of the Applicant. He submitted that the evidence of the Auditor cannot prove charge under section 408 of I.P.C. The learned A.P.P. has supported the impugned Judgments and orders.

6. I have considered the rival submissions. The Courts below held that it is established that only the Applicant was responsible for day to day money transactions of the society and entrustment of the amount in the hands of the Applicant has been proved. Reliance is also placed on the statement under section 313 of the Code of Criminal Procedure, 1973 in which the Applicant stated that he has deposited defalcated amount in two instalments.

7. The Sessions courts found that the evidence of the Auditor

Shri V.V.Sutar (Exh.15) has not been seriously challenged in his cross examination and whatever has been stated by the prosecution witnesses has remained unchallenged. The Courts below have accepted the fact that the accounts book and other books were in custody of the Applicant and it was the Applicant who was responsible for maintaining the Books of accounts. The Courts below have considered the entire evidence on record and recorded the finding of guilt. There is no material illegality or procedural illegality committed by the Courts below. In a Revision Application under Section 401 of the said Code, evidence cannot be re-appreciated. There is no merit in the Revision Application and the same is rejected.

JUDGE